Bruised, but not dead (yet): The Polish Constitutional Court has spoken

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The problem of democracy and judicial review is a problem engendered by successful constitutional courts. For where courts are not successful in establishing veto powers over legislation, no problem or only a very limited problem occurs[1]

With two judgments of 3rd and 9th of December, the Polish constitutional crisis has entered a new phase[2]. The authoritative interpretation given by the Polish Constitutional Court ("the Court") left no doubt as to the creeping constitutional *coup d'état* [3], yet the judgments are being publicly ridiculed and defied by the ruling majority. Despite enormous political pressure, the Court did not flinch: in both cases it stood up for the Constitution, gathered itself and delivered strong unanimous judgments. However in both cases it was painfully clear that the old powerful, confident and held-in-esteem court was already gone. The Court we saw on 3rd and 9th of December was alive, but severely bruised, wounded and shell-shocked, hardly able to discharge its constitutional duties.

Back to constitutional basics. *First Act*

The Court stepped in on 3rd of December with a strong unanimous judgment in case K 34/14 on the unconstitutionality of the Law on the Polish Constitutional Court adopted on 25th of June 2015.

Before ruling on the merits though, the Court resorted to an exceptional legal instrument – an order for injunction which is used to protect the legal order in the state governed by the rule of law. Sitting as the Full Court on 30th of November, it issued an injunction ordering all public authorities to abstain from any actions which might undermine the effectiveness of the pending review of constitutionality of the Law. The injunction is preventive in nature, has the effect of final judgment and is binding to those to whom it is addressed. Its aim is to make sure that any future decision given in the case on merits by the Court will be enforceable and devoid of purpose. In the injunction the Court emphasized that the selection of 5 new judges before the decision on the constitutionality made by the Court "*would be irreconcilable with the competences of the Courts as the only institution to rule of the constitutionality of the law. Should the sejm proceed with the selection of the judges nonetheless, it would deprive the judgment in Case K 34/14 of all its effectiveness*"[4]. The order is an example of the Court self-defending against the attacks on it by the political world. It might be useful to recall M. Shapiro's argument about the consequences of the choice made by the constitution makers to resort to a court as a conflict resolver. Such choice entails the acceptance of "*the inherent characteristics, practices, strengths and weaknesses of that institution … and some law making by courts and a certain capacity for judicial self-defense of its law making activity. The issue of whether such law making and self-defense are somehow antidemocratic or antimajoritarian is uninteresting. If the demos chooses the institution, it chooses the judicial law making and judicial self-defense"[5]*. This self-defense rationale is written all over the order. Yet as important as it is, it is now only of symbolic importance since the Sejm at the sitting on 2nd of December unceremoniously selected new justices against the Court's order.

In the highly anticipated judgment in K 34/14 the Court ruled that the selection of the three justices to replace those whose term of office came to an end during the term of the old Sejm was constitutional. On the other hand, the old Sejm acted unconstitutionally by selecting two justices whose term of office would come to an end in December 2015. These two justices should have been selected by the new Parliament. In the judgment the Court also left no doubt that the President has no role to play in the selection of the constitutional justices. The Constitution vests exclusive authority to shape the composition of the Court with the Legislative branch of the government (Sejm). It is the duty of the President to swear in the justices selected by the Sejm and the President

must do so “immediately”.

Back to constitutional basics. *Second Act*

On 9th of December the Court, composed of 5 justices, adjudicated on the constitutionality of the amendments of 19th of November made by the new Parliament (Sejm) to the Law of 25 th of June on the Polish Constitutional Court. The case was initiated on motions by the Polish Ombudsman, First President of the Supreme Court, the National Council of the Judiciary and the minority members of parliament[6]. The amendments enacted by the majority annulled the selection of the 5 justices made by the old Sejm and paved the way for the selection of new “good” justices on 2nd of December. To make things even more serious, the Law of 19th November envisioned a limited (3 years, today it is 9 years) term of the President and Vice President of the Court, applies this change to the current President and Vice-President and voided their terms of office. It further stipulated that the selection of the justices whose term of office expires this year is to take place within 7 days of the entry into force of the Law. It also made the appointment conditional upon taking the oath before the President. The Senate voted in favour of the amendments on November 20th and President signed it into law later that day.

In the judgment of 9th of December, 2015 the Court unanimously declared most of the amendments unconstitutional. Proceeding step by step it identified constitutional flaws in the law. In a nutshell:

Firstly, the Court ruled unconstitutional the possibility of serving as the President and Vice-President of the Court for two consecutive terms. It held that this creates a danger that the executive branch of the government would try to interfere with the internal functioning of the Court and as such call into question the impartiality of the justices and the independence of the Court as a whole. As a result it breached art. 173 of the Constitution (independence of the judiciary) in conjunction with art. 10 (separation of powers).

Secondly, the Court ruled unconstitutional the provision in the new Law whereby the newly elected justices were to take their oath before the President within 30 days since being elected. The Court stressed that the justices should be able to take the oath immediately after their selection and the President should make this possible. The Court added that the 30 days period is unconstitutional because it allows the President to play an active role in the selection of the constitutional justices and as such flies in the face of art. 194(1) of the Constitution which says “*The Constitutional Court shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office*”.

Thirdly, it is unconstitutional to condition the start of the term of office of the justices on the taking of an oath by the President. The Court clarified that the 9 year term of office starts on the day on which the Sejm selects the justices, and not on the day of the oath. The Court argued that accepting the latter interpretation would again involve the President in the process of selection of constitutional justices, whereas the Constitution clearly vests the power of selecting the justices with the Sejm.

Fourthly, the Court ruled that the amendments to the Law on the Polish Constitutional Court can not retroactively interfere with the valid selection of the 3 justices already made by the old Sejm to fill the 3 seats vacated by the justices whose term of office came to an end on 6th of November. This finding is crucial and should be read as reinforcing the judgment of 3rd of December in which the Court held that the election of the 3 justices made by the old Sejm was constitutional, the Court left only two seats vacant. As a result of simple math, new Sejm is empowered to elect 2, not 5, justices. Although the Court did not touch on the issue directly, there is no doubt that the unconstitutionality of this amendment vitiates the election of 5 justices made on Sejm on 2nd of December and, as a result, their swearing in by the President.

Finally, it is unconstitutional to void the term of office of the current President and Vice-President of the Court within the 3 months of the entry into force of the Law under consideration. It breaches the Court’s independence and art. 173 of the Constitution which reads “*The courts and tribunals shall constitute a separate power and shall be independent of other branches of power*”. The Court admitted that while it is conceivable for the legislator to change the length of the term of office of both the President and the Vice-President, the voiding of

the term of office that already has started to run impinges on the prerogative of the President to nominate the President and Vice-President of the Court (according to art. 194(2) of the Constitution "*The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal"*).

Will Europe speak up please?

Indeed, it is hard to imagine judgment that would be more devastating for the majority. The Court's " *No*" against redrawing constitutional lines and making inroads into well-established constitutional concepts and practices could not be clearer and louder. On 9th of December all lingering constitutional doubts were dispelled. These pronouncements should be enough of a warning in the state governed by the rule of law.

However, the problem is that the majority of the day has a completely different conception of the rule of law, and respect for verdicts of the Constitutional Court does not come within the "rule of law package" as understood by the majority. Packing the Court by selecting its own subservient justices, defying the authority of the Court's judgments (as of writing, the judgment of 3rd of December has not been published in the Journal of Laws) and "mobbing"[7] current justices clearly shows that we are not dealing with just another dispute reserved for legal aficionados.

The attack on the Court is unprecedented in scope, cold efficiency and intensity. It aims to paralyze and incapacitate the Court. The problems the Court had already encountered in K 34/15 in finding enough justices to decide the case clearly show that this long-term plan starts to work[8]. Polish democracy is faced today with a crisis that has more to do with the lack of *constitutional culture*[9] rather than deficiencies of the *constitutional text.* The former should underpin all constitutional commitments and guarantee their enforcement. Without constitutional culture and entrenched respect for these commitments, the constitution is not worth the paper it is written on, and this is exactly the situation in Poland: The constitutional text remains unenforced since the institution called on to enforce it is marginalized and openly defied.

One can see great dangers in a thinking whereby the political will of the new majority could replace decisions of the constitutional court with constitutional monopoly of adjudication. On this reading moral doubts of the parliamentary majority would suffice to set aside law which was validly adopted and upheld by the court. It is the sheer power that dominates, with constitutional considerations relegated to the margins.

W. Sadurski argues EU is increasingly becoming a community of values rather than merely a community of interests. "*EU can be mobilized against nationalistic, xenophobic, authoritarian trends and there is a degree of transnational solidarity on the part of liberal democratic forces that can count on the political resources of the EU*". More crucially he enlarges on an argument which might be called " *containment*" – the EU is seen as a forum to constrain national self-determination and mitigate its excesses. He claims that "*with the awareness that a possible lapse into a nationalist-authoritarian option in the new Member States of Central and Eastern Europe is not merely an 'internal domestic affair' but rather immediately becomes a 'European' problem penetrating public opinion in these states, the political mechanisms for preventing and countering such collapse are themselves becoming more resilient. Accession to the EU may not be a panacea for all the problems of democracy but it provides reasonably good protection against possible future disasters*"[10]. Europe will indeed have its hands full with Poland in the days to come. Unfortunately, so far it has not shown much teeth in response to the constitutional shenanigans playing out in Poland. This must change or Warsaw will become another Budapest with Europe idly watching.

Of junk yard dogs and contracts not honored

The decision to have an independent constitutional arbiter is always consequential. The well know metaphor of "junk yard dog" concocted by M. Shapiro comes to mind here: "*while those creating institutions may ,customize' each of the institutions they choose, constitution makers cannot avoid … that institutions once chosen, will act in ways characteristic of those institutions, ways that had been institutionalized before the particular set of constitution makers chose that particular institution. The ,junk yard dog' is a fierce dog kept confined during*

business hours and set loose to roam the junk yard and attacking any and all interlopers. As to the owner of the junk yard who, for some reason, enters at midnight and comes to canine grief, there is a saying: If you buy a junk yard dog…. An institutional theory of constitutions argues that institutions like legislatures and courts have certain embedded behavior patterns that will come out no matter the constitution matrix in which they are inserted although, of course, they will be constrained by whatever constitutional matrix contains them. Thus, if the people choose judicial review courts, those courts will make constitutional law just as inevitably as dogs will bite. And courts unchained against interlopers may well bite the wrong person from time to time"[11]. Constitutional courts will indeed sometimes find the acts of other parts of government unconstitutional, even when those acts are backed by current majority of voters or their representatives. This is part and parcel of the constitutional deal that a principal strikes with an agent once it resorts to constitutional review. It looks as if the parliamentary majority in Poland sees itself empowered to renege on its part of the contract, and with damaging consequences for the rule of law.

By way of conclusion, we may recall the words of the US Supreme Court Justice Charles Evans Hughes "*We are under a Constitution, but the Constitution is what the judges say it is*". The Polish version of this would be located on the other end of the spectrum and might be summed up: "*We are all under the Constitution but the Constitution is what the I, the Parliament, say it is*". There is no doubt that Poland is in for a long and bumpy constitutional ride. Nobody really knows when and how this constitutional roller coaster will come to end. One thing is beyond doubt: it does not look good.

[1] M. Shapiro, *The European Court of Justice: of Institutions and Democracy*, 32 Israel Law Review 1.

[2] See also my post *Polish Constitutional Drama: of Courts, Democracy, Constitutional shenanigans and Constitutional self-defense*) available at http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/

[3] On the constitutional crisis in Poland see also A. Śledzińska – Simon, *Poland's constitutional Tribunal under siege*, available at http://verfassungsblog.de/en/polands-constitutional-tribunal-under-siege/

[4] The order of 30th of November, 2015, p. 4.

[5] M. Shapiro. Supra. Note 1.

[6] All procedural documents are available in Polish at www.trybunal.gov.pl

[7] Term used by the former President of the Constitutional Court – Marek Safjan, to describe the methods used by PiS during its first grip on power in 2005 – 2007. See His *Politics and Constitutional Courts. A Judge's Personal Perspective*, EUI Working Paper 2008/10. He defines political mobbing as a "deformation of relations between the justice system and the world of politics"

[8] Originally both cases were to be heard by the Full Court (minimum 9 justices must sit) but the Court was unable to form it.

[9] See also W. Sadurski, *Constitutional Courts and Constitutional Culture in Central and Eastern European Countries* in A. Febbrajo, W. Sadurski, (eds.) *Central and Eastern Europe After Transition. Towards a New Socio – Legal Semantic*, 2010.

[10] See His *Constitutionalism and the enlargement of Europe*, 2012, p. 209 – 210.

[11] M. Shapiro, *The European Court*, supra note 1, at. p. 7.

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